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Supreme Court No. 95080-6
COA No.35204-8-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

MIKHAIL G. KARPOV,

Defendant/Petitioner.

ANSWER TO DEFENDANT'S MOTION FOR
DISCRETIONARY REVIEW

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I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the District Court, the appellant in the Superior Court, and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Charges against Mr. Karpov were dismissed by the District Court. The State appealed, and the Superior Court reversed the dismissal. The Court of Appeals then denied Mr. Karpov's motion for discretionary review. He now moves this Court for discretionary review. The State seeks denial of that motion.

III. ISSUE PRESENTED

Whether the Court of Appeals properly denied discretionary review?

IV. STATEMENT OF THE CASE

Sometime in November of 2015, Sierra Frank had just left work and was waiting at a bus stop at the corner of Sprague Avenue and Green Street. RP 74. Mikhail Karpov, who was driving an SUV, pulled into a parking lot near her in an SUV. RP 75. He rolled down his passenger window and asked her to come over. *Id.* After a brief conversation, she approached the vehicle, only to realize that Mr. Karpov had his penis exposed and was masturbating. RP 76. Mr. Karpov then asked her if she needed a ride, and stated that he had money. RP 76. She refused and told him to leave. *Id.*

On December 9, 2015, Hannalora Baldwin was waiting at a bus stop on the corner of Empire and Nevada. While she was waiting, Mr. Karpov drove up in an SUV. RP 92. He circled the block, and then stopped in front of her. RP 92-93. While he was stopped there, he stared at Ms. Baldwin and masturbated. RP 93-95. The next day, Mr. Karpov repeated his performance. RP 137. He stopped at the corner of Maple and Garland, and sat in his vehicle masturbating in front of another young woman, Rachel Napier. RP 138-140. Both Ms. Baldwin and Ms. Napier immediately reported these incidents to the police. RP 96, 141.

On May 3, 2016, 12-year-olds J.C. and H.J. walked home from North Pines Middle School. RP 29, 50. As the two girls left the school, Mr. Karpov was seated in his car near the entrance. RP 31, 50-51. The two girls turned and walked down Alki, and Mr. Karpov followed them in his car. RP 32, 52-53. The girls turned the corner onto Bowdish, and when they got to the intersection with Broadway, Mr. Karpov pulled up next to them and stopped. RP 32, 53. He had his penis out, and was stroking it while staring at the girls. RP 33, 36, 53. Shocked and scared by the sight, the girls ran across the street and into Broadway Elementary, where they reported the incident. RP 33-34, 54.

On June 1, 2016, Mr. Karpov went to Cougar Mechanical on East Joseph. RP 116-118. There, he got out of his car and stood close to a

window, looking in at Jennifer Ferry while he masturbated. RP 117. In response, she ran to the door of her office and yelled at him as he fled the scene. RP 119-120.

As a result of these incidents, Mr. Karpov was charged with five counts of indecent exposure. *See* Amended Complaint. The charges proceeded to trial where the two girls and four women recounted the events, and described the locations of each incident. *See* RP 27-157. After they testified, Detective Streltsoff of the Spokane County Sheriff's Office detailed his investigation of the incidents. RP 157-190. He stated that the two incidents from December of 2015 (involving Ms. Napier and Ms. Baldwin) happened within the City of Spokane, and that the incident involving Jennifer Ferry was referred to him by Spokane Police. RP 160, 183. The State rested its case. RP 214.

At that stage, Mr. Karpov moved for a dismissal of all charges. RP 218. He argued that jurisdiction was an essential element of the crime, and that because none of the witnesses directly stated that any of the events happened in Spokane County, the State failed to establish that element. RP 218. The trial court then dismissed the charges finding that the State failed to prove that the crimes happened in Spokane County. RP 225-26.

The State appealed, and the Superior Court found that there was sufficient evidence to prove the situs of the crimes beyond a reasonable

doubt; the Superior Court reversed the dismissal and remanded the case for a new trial. *See* Decision and Order at 5 (attached to Motion for Discretionary Review as Appendix C). Mr. Karpov sought discretionary review at the Court of Appeals, which the court denied. *See* Motion for Discretionary Review at Appendices A and B. He then further sought review by this Court.

V. ARGUMENT

When the Court of Appeals denies a motion for discretionary review, this Court may accept review of that denial as an interlocutory decision. RAP 13.3(a)(2). The Supreme Court will only accept review of such a decision under limited circumstances. RAP 13.5(b). Mr. Karpov urges this Court to accept review on the grounds that the Court of Appeals has committed obvious error which would render further proceedings useless. RAP 13.5(b)(1). However, the Court of Appeals did not err.

In reviewing an appeal from a court of limited jurisdiction, the Court of Appeals may only accept discretionary review if (1) the decision is in conflict with established precedent, (2) a significant constitutional question is involved, (3) the decision is an issue of public interest, or (4) the superior court has radically departed from the usual course of proceedings. RAP 2.3(d). Mr. Karpov asked the court to accept review under either of the first two prongs, arguing that his constitutional right not to be twice put

in jeopardy would be infringed by a retrial. However, the Superior Court's decision was consistent with well-established case law and a retrial will not infringe upon Mr. Karpov's constitutional rights.

When a judge dismisses a case during or after trial for insufficient evidence of some element of the crime, this amounts to a judgment of acquittal and constitutional protections against double jeopardy bar any retrial. *See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A verdict of acquittal terminates jeopardy, triggering the constitutional protections that prohibit a future trial for the same crime. *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed.300 (1896). Even if an acquittal is erroneous, the defendant cannot be retried. *Id*; *see also State v. Jubie*, 15 Wn. App. 881, 552 P.2d 196 (1976). However, where the defendant obtains a termination of trial unrelated to his factual guilt or innocence, the State may reinstate proceedings upon reversal of that decision on appeal. *United States v. Scott*, 437 U.S. 82, 94-96, 98 S.Ct. 2197, 57 L.Ed.2d 65 (1978).

Mr. Karpov created the issue here by asserting that "jurisdiction" is a necessary element of any crime that must be proven at trial. That the crimes happened in Spokane County is not an element of the charged crime of indecent exposure. RCW 9A.88.010. Consequently, when the court erroneously resolved this factual issue, there was no judgment of acquittal,

and there is no constitutional restriction against a retrial. *See City of Spokane v. Lewis*, 16 Wn. App. 791, 559 P.2d 581 (1977); *see also Town of Forks v. Fletcher*, 33 Wn. App. 104, 106-07, 652 P.2d 16 (1982).

Mr. Karpov argues that the Court of Appeals confused jurisdiction and venue, even though his entire argument is premised on conflating a variety of related concepts with jurisdiction. He relies on generalized propositions that proof of jurisdiction is necessary to any criminal prosecution, in order to argue that proof of jurisdiction is an element of the crime. That the State must prove jurisdiction to the court does not mean jurisdiction must be proved to the jury or that jurisdiction is an element of the crime. Rather, jurisdiction is a question of law. *State v. Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012).

It is well-settled that questions of law are determined by the court, while questions of fact are submitted to the jury. *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 681, 143 P. 146 (1914); *Bacon v. City of Tacoma*, 19 Wash. 674, 676-77, 54 P. 609 (1898). Jurisdiction only becomes a question for the jury if there is some disputed issue of fact underpinning the court's jurisdiction.¹ *State v. L.J.M.*, 129 Wn.2d 386, 396-

¹ Out of context, the comment to WPIC 4.20 seems to suggest that jurisdiction must always be proven to the jury. However, the comment to the following section, 4.21, clarifies that this is only the case "if the facts on which jurisdiction is based are in dispute." Ironically, it is very clear in older

97, 918 P.2d 898 (1996). Then, it is appropriate for the jury to resolve that dispute. Consequently, the State only bears a burden of proving jurisdictional facts at trial if there is some conflicting evidence concerning those facts. *See State v. Boyd*, 109 Wn. App. 244, 251, 34 P.3d 912 (2001) (enunciating the shifting burden of proof on questions of jurisdiction). Here, there has never been any real dispute as to whether the court had jurisdiction over the charges. Consequently, the State was not required to prove any jurisdictional facts at trial.

Instead, the real dispute was whether there was sufficient evidence at trial that the crimes occurred in Spokane County. The situs of the crime in a particular county is not an element of the crime, nor a jurisdictional question, but relates instead to venue. *State v. Miller*, 59 Wn.2d 27, 365 P.2d 612 (1961); *State v. Johnson*, 45 Wn. App. 794, 727 P.2d 693 (1986). Unlike jurisdiction, there is a longstanding requirement in Washington that the State prove venue at trial.² *State v. Kincaid*,

comments to the WPIC that the locational element in the “to convict” instruction is a question of venue, not jurisdiction, and is not an element of the crime. *See State v. Brown*, 29 Wn. App. 132, 134, 627 P.2d 132 (1981).

² Several recent decisions question whether the State must prove venue as a matter of course. Instead, they hold that a defendant waives any challenge to venue if it is not raised prior to the end of the State’s case. *See State v. McCorkell*, 63 Wn. App. 798, 801, 822 P.2d 795 (1992); *State v. Pejsa*, 75 Wn. App. 139, 145, 876 P.2d 963 (1994). Since venue is derived from constitutional protections, such a finding of waiver from inaction seems

69 Wash. 273, 274, 124 P. 684 (1912); *State v. Hardamon*, 29 Wn.2d 182, 188, 186 P.2d 634 (1947). This requirement arises from a criminal defendant's right to a trial by a jury from the county where the crime is alleged to have been committed. Wash. Const. art. 1, § 22; *State ex rel. Howard v. Sup. Ct. of Pac. Cnty.*, 88 Wash. 344, 345, 153 P. 7 (1915).

It is equally well established that to satisfy this requirement, no witness need testify directly that an offense was committed within the county. *State v. Smith*, 65 Wn.2d 372, 397 P.2d 416 (1964); *State v. Stafford*, 44 Wn.2d 353, 356-57, 267 P.2d 699 (1954); *Kincaid*, 69 Wash. at 274-75. Rather, it is sufficient if it appears indirectly that venue is properly laid. *Id.* Streets, buildings, or landmarks that the jury would recognize are sufficient to establish venue. *Johnson*, 45 Wn. App. at 796, citing *Kincaid*, 69 Wn.2d at 273. Furthermore, because venue is unrelated to factual guilt or innocence, an erroneous dismissal for failure to prove venue does not bar retrial. *Johnson*, 45 Wn. App. at 797.

questionable. See Wash. Const. art. 1, § 22; *State ex rel. Howard v. Sup. Ct. of Pac. Cnty.*, 88 Wash. 344, 345, 153 P. 7 (1915).

At trial, the State presented extensive evidence of the various locations where these crimes occurred, and further evidence that several of these locations were in the City of Spokane. Given the evidence, a jury could readily have concluded beyond a reasonable doubt³ that these events happened in Spokane County. The Superior Court considered the evidence presented at trial and the law, and properly reversed the dismissal of charges. That reversal was consistent with well-established law. Consequently, the Court of Appeals correctly declined discretionary review. As a result, there is no reason under RAP 13.5 justifying discretionary review at the Supreme Court.

VI. CONCLUSION

Contrary to law, the trial court dismissed all charges because no witness testified directly that the events happened in Spokane County. On appeal, the Superior Court considered the evidence presented at trial and the pertinent law, and reversed that ruling. The Court of Appeals correctly denied discretionary review because the Superior Court followed well-

³ Although, venue need only be shown by a preponderance of the evidence. *State v. Dent*, 123 Wn.2d 467, 480-81, 869 P.2d 392 (1994).

settled law. Consequently, this Court should deny discretionary review,
because there is no obvious error.

Respectfully submitted this 8 day of November 2017.

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Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Samuel J. Comi", written over a horizontal line.

Samuel J. Comi #49359
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Attorney for Respondent

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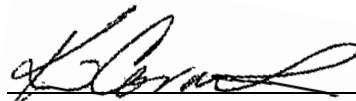
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 8, 2017, I e-mailed a copy of the Answer to Defendant's Motion for Discretionary Review in this matter, pursuant to the parties' agreement, to:

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(Date)

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(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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